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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re J.J., a Person Coming Under the
Juvenile Court Law.

B208305

(Los Angeles County
Super. Ct. No. CK35150)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Zeke Zeidler,
Judge. Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and
Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel, and Tracey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

D.H. (father), presumed father of J.J. (child), appeals from the juvenile court's jurisdictional order sustaining counts b-4 and g-1 of a Welfare and Institutions Code section 300¹ petition filed by the Department of Children and Family Services (DCFS) on behalf of child. Father further appeals the juvenile court's finding of a substantial risk of detriment to child and her removal from father's custody and care. We affirm the court's jurisdictional and dispositional orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. Case History

Child was born in December 2004. She first came to the attention of DCFS at the time of her birth as she was born under the influence of illicit drugs and had a positive toxicology screen for cocaine. The juvenile court sustained allegations that child's mother, D.J. (mother), had a long history of substance abuse and was a user of cocaine at the time of child's birth. The juvenile court also found true allegations that father "leads a transient lifestyle . . . [and] has not secured appropriate housing to ensure that child has shelter." On December 29, 2004, the juvenile court found father to be child's presumed father. On September 28, 2005, the juvenile court terminated reunification services for father due to his failure to complete court ordered programs. The court ordered "monitored visits for father until completion of drug testing and drug counseling and securing appropriate housing." The court found that mother had complied with the case plan and resolved the issues that brought child into the dependency court system. Joint legal custody was granted to mother and father, and physical custody was granted to mother.

2. Detention

On February 17, 2008, Officers Ruiz and Mendoza were on routine patrol in the vicinity of the 300 block of South Willowbrook Avenue in Compton. Their attention was drawn to a car driving southbound in the northbound lane. The officers stopped the

¹ All further statutory references are to the Welfare & Institutions Code.

vehicle to investigate and found that the driver, mother's male companion, was under the influence of alcohol. Mother, who was a passenger in the vehicle, was observed to be under the influence of cocaine. The officers reported that mother had rock cocaine and a crack pipe in her possession. Child was asleep in the back seat of the vehicle without a car seat. The back seat was littered with empty beer bottles, trash and broken glass.

Mother's male companion was arrested for driving under the influence of alcohol. Mother was arrested for being in possession of narcotics and child endangerment. Child was taken into protective custody and placed in foster care.

DCFS attempted to contact father on February 18, 2008, and was finally able to make contact on February 19, 2008, at approximately 4:00 a.m. Father told the social worker that he wanted child released to him. The social worker requested information in order to run a criminal background check prior to placing child in his care. Father provided the information requested. Father told the social worker that he did not have a relationship with mother, so he did not know about her drug usage. He stated that he maintained contact with child and visited her frequently. Father admitted he was unemployed and, therefore, unable to provide financial support for his daughter. However, he said that he provided diapers on occasion. Father added, "One reason that I do not provide financial support is because I question my paternity." Father requested that a paternity test be ordered by the dependency court.

3. Section 300 Petition and Detention Hearing

On February 21, 2008, DCFS filed a petition pursuant to section 300 alleging that child needed the protection of the juvenile court. Along with its allegations regarding mother, the petition alleged that father failed to provide child with the necessities of life, including food, clothing, shelter, and medical care. DCFS alleged that due to father's failure to provide for her, child fell within the description of section 300, subdivisions (b) and (g).

The detention hearing was held on February 21, 2008. Father did not appear. Father's counsel stated that she had spoken to father by telephone, and was available to

represent him. The juvenile court appointed her. Father's counsel requested that the court order a paternity test, and informed the court that father would like custody if he were deemed the biological father. In the interim, father's counsel requested that father have unmonitored visitation with child at least twice a week. The court denied father's request for a paternity test, and deferred a paternity finding until father appeared in court.

The court held that DCFS had established a prima facie case that child was a person described by section 300, subdivisions (b) and (g). The Indian Child Welfare Act was found to be inapplicable. The court granted mother and father monitored visitation with child, who was ordered detained in shelter care. The case was continued for a preadjudication resolution conference.

4. Preadjudication Resolution Conference

On April 10, 2008, DCFS filed a jurisdiction/disposition report. Mother had informed the DCFS social worker that father was not the biological father of child. However, DCFS noted that on December 29, 2004, the juvenile court found father to be child's presumed father; and on September 28, 2005, the juvenile court granted joint legal custody of child to mother and father. Although mother reported that father had a good relationship with child, father had not visited her since she was detained.

DCFS recommended that child remain in foster care and asked the court to deny reunification services to both mother and father pursuant to section 361.5.

Father did not appear at the conference, which took place on April 10, 2008. Father's attorney requested an opportunity to locate her client. The court denied father's request for paternity testing because father had previously asserted that he was the biological father of child and had received six months of reunification services. Mother had been testing negative for drug use. Mother was not in agreement with DCFS's recommendation that she be denied reunification services, and requested that the court set both the jurisdictional and dispositional hearings for trial. Father's attorney also disagreed with DCFS's recommendation that father be denied reunification services. The court ordered father's attorney to submit points and authorities as to why a parent whose

family reunification services were previously terminated should be granted family reunification services on a subsequent petition. The matter was continued for a contested disposition hearing.

5. Contested Jurisdiction/Disposition Hearing

On April 22, 2008, father's counsel submitted points and authorities addressing the question of whether the court can properly deny family reunification services to a parent when that parent received reunification services on a prior sustained petition. Father's counsel noted that father had been provided with six months of family reunification services in 2005, and was ordered by the court to complete random drug testing and to show a stable lifestyle and stable housing. Father's counsel maintained that father wanted child released to his care, and despite his lack of court appearances, he maintained an interest in reunifying with her.

The adjudication of the matter was set for May 6, 2008, but was continued to May 7, 2008. On that date, DCFS presented its documentary evidence, including a last minute information for the court dated May 6, 2008, attaching letters of support for mother. DCFS recommended that mother continue drug testing, indicating that it would consider changing its recommendation regarding family reunification services for mother. DCFS continued to recommend that father not be provided family reunification services. The court took judicial notice of the custody order filed on September 28, 2005, as well as "any sustained petitions, case plans and minute orders in the case file regarding this minor."

Father did not appear in court for the adjudication on the petition, which was held on May 7, and 8, 2008. Nor did father appear in court on May 9, 2008. DCFS reported that the only contact it had with father was at the time of the child's detention. He had not contacted DCFS despite a social worker's attempt to contact him by calling and sending notices. On May 9, 2008, the court asked father's counsel what her client was asking for. Father's counsel responded that she had had "no personal contact" with father despite sending several letters, none of which were returned.

DCFS investigator Karen Gage testified regarding the events which led to the detention of child. DCFS opined that child could safely be returned to mother's care on the condition that mother continue testing drug free. The following day, mother pleaded no contest to amended language in the petition filed by DCFS. Father's counsel argued that counts b-4 and g-1 of the petition should be dismissed for insufficiency of the evidence and lack of nexus to support a finding that father posed any risk to child.

The court denied father's request, explaining that "father's application closed previously with him not having custody and him having monitored contact because he had not made substantial progress in a drug program with random testing and verifying a stable lifestyle and stable housing." Over father's counsel's objection, the court took judicial notice of the custody orders filed September 28, 2005. Father's counsel objected that the court's decision to take judicial notice was "not timely and it's not proper." The court disagreed, stating that the custody order was a court order, and explaining "[i]t's very timely, you have had it for three years, you were his attorney at the time." The court informed father's attorney, "I'll let you reopen," to which father's attorney responded, "No."

The court then found counts b-1, b-4, and g-1 true as amended to conform to proof. The court added a sentence which stated that "father previously received reunification services and failed to reunify; the case closed with father having monitored visits because he did not make substantial progress in a drug abuse treatment program and testing nor did he verify stable housing and a stable lifestyle." Father's counsel objected to the statement, arguing that it went beyond the proof. The court overruled counsel's objection.

The court then proceeded to the disposition. Father's counsel requested family reunification on father's behalf. DCFS argued that reunification services should not be provided to father. DCFS pointed out that when father was contacted at the time of the initial detention, he questioned his paternity of child. DCFS further argued that after the first and only contact with father during the pendency of this case, father had not come

forward or responded to any of DCFS's efforts to contact him. He had not even communicated with his attorney. In addition, he did not reunify with child during the previous proceedings.

Following argument, the court found that a substantial danger existed as to the child's physical or mental health in the care of the father. Child was declared a dependent of the court: "Care, custody, and control is . . . take[n] from the father, to [the] extent he had custody, but he didn't have custody."² Child was placed in the home of mother under the supervision of DCFS. Mother was ordered to attend and complete DCFS approved programs of drug rehabilitation with weekly random testing, and individual counseling. The court exercised its discretion not to grant father family reunification services pursuant to section 361.2. Father was granted monitored visits. Father's counsel filed a timely notice of appeal.

DISCUSSION

I. Jurisdictional Findings

A. Standard of Review

A juvenile court's jurisdictional findings are reviewed under the substantial evidence standard. "[T]he power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact. [Citation.]" (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

In making its determination of jurisdiction, the juvenile court must first consider whether the minor is a person described by section 300. For this purpose, "any matter or

² The court noted that father had joint legal custody, not physical custody.

information relevant and material to the circumstances or acts which are alleged to bring him or her within the jurisdiction of the juvenile court is admissible and may be received in evidence.” Proof by preponderance of the evidence is required to support a finding that the minor is a person described by section 300. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 198.) Substantial evidence is evidence which is “reasonable, credible, and of solid value.” (*Id.* at p. 199.) Past infliction of harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; there must be some reason to believe the acts may continue in the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

B. The Juvenile Court Properly Assumed Jurisdiction

The juvenile court assumed jurisdiction over child based on its findings that she was a child described under section 300, subdivisions (b) and (g). The allegations contained in count b-1 pertained only to mother’s actions, while the allegations in counts b-4 and g-1 pertained to the actions of both mother and father. Father argues that counts b-4 and g-1 should have been dismissed as to father pursuant to section 350, subdivision (c) which provides:

“At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition”

Father’s argument that counts b-4 and g-1 should be dismissed as to father pursuant to section 350 lacks merit. Father makes no argument that the allegations based on the conduct of mother should be dismissed, and a juvenile court may properly assume jurisdiction even where the jurisdictional allegations are found true as to only one parent. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 [“the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent”].)

Dependency jurisdiction is properly established where the evidence proves the applicability of any subdivision of section 300. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112-113.) Because father does not challenge the court's jurisdictional finding under count b-1, and does not challenge the court's jurisdictional findings under count b-4 as to mother, jurisdiction would be proper even if father's arguments were meritorious. Because father does not contest the propriety of jurisdiction on the basis of the allegations regarding mother, the sufficiency of the evidence as to the alternative bases for jurisdiction is not necessary to the resolution of this issue.³ (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 330; *In re Jonathan B.*, *supra*, at p. 875.)

C. Substantial Evidence Supports the Juvenile Court's Decision to Sustain Count b-4

Even if it were necessary for this court to address the sufficiency of the evidence supporting the jurisdictional allegations against father, we would find that the juvenile court's decision to assume jurisdiction was proper.

Section 300, subdivision (b), authorizes dependency jurisdiction where the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of the failure of his parent to adequately supervise or protect the child or by the failure of the parent to provide regular care for the child due to the parent's mental illness, developmental disability, or substance abuse.

Count b-4 alleged that father failed to provide child with the necessities of life including food, shelter, and medical care, and that such failure endangered child's

³ Father argues that he may attempt to gain custody of child should reunification or placement with mother fail. Thus, father maintains, this court should address the jurisdictional findings concerning father because his right to custody of his daughter in the future will be affected by those findings. Father's concerns are too speculative and remote to warrant a variance from established law providing that a juvenile court's finding of jurisdiction may be affirmed on any valid ground.

physical and emotional health. Pursuant to the court's amendment, count b-4 further alleged that father previously failed to reunify with child, never moved beyond monitored visits with her, did not make substantial progress in a drug abuse treatment program, and failed to verify stable housing and a stable lifestyle.

The evidence supported the court's decision that these allegations were true. In September 2005, the same court found that child should not be placed in father's custody until he had completed a drug counseling and testing program and secured appropriate housing.⁴ There was no evidence presented to the juvenile court showing that father has since made any efforts to complete drug rehabilitation or otherwise comply with the court's directives.⁵ Thus, by court order, father was not permitted to have unmonitored contact with child, much less supervise or provide regular care for her. Father never completed the court ordered programs and never regained physical custody of child.

We reject father's argument that there is no nexus between father's conduct in 2005 and any present risk to child. Father's current status as a noncustodial parent, limited by court order to monitored visits, is directly related to his inability to currently

⁴ The court took judicial notice of the custody order filed September 28, 2005, as well as any prior sustained petitions, case plans and minute orders regarding child. These documents constituted admissible evidence supporting the allegations in count b-4. Father argues that the prior sustained petitions, case plans and minute orders were admitted only for dispositional evidence, not as part of the jurisdictional hearing. However, we do not read the trial transcript or the minute order to so limit the court's consideration of that evidence. In fact, the court specified that "Regarding disposition, the court will be considering the same documents considered for jurisdiction purposes." Even if father were correct that the prior sustained petition and case plan were not admitted as part of the jurisdictional hearing, the custody order alone contains a sufficient basis for the court's findings. It indicates that father's reunification services were terminated and that father was restricted to monitored visits with child "until completion of drug testing and drug counseling and securing appropriate housing."

⁵ In fact, apart from his initial contact with DCFS, he made no effort to communicate with DCFS, his lawyer, or the court.

care or provide for her. Sufficient evidence supported the juvenile court's finding that father is unable to adequately supervise, protect or provide for child as set forth in count b-4.⁶

II. The Juvenile Court Was Not Required to Make a Finding of Detriment as to Placement With Father

Father argues that the juvenile court erred when it found by clear and convincing evidence that a substantial danger existed to child's physical or mental health in the care of father because such a finding was unsupported by the record before the court. In support of this argument, father cites section 361, subdivision (c), which provides:

"A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following . . . :

"(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . The court shall . . . consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

Father did not have physical custody of child at the time the petition was initiated therefore the juvenile court was not required to find clear and convincing evidence of

⁶ Father also contends substantial evidence does not support the finding that child comes within the jurisdiction of the court under section 300, subdivision (g). DCFS concedes that child is not one described under that subdivision. We need not address this issue, because, as explained above, dependency jurisdiction is properly established where the evidence proves the applicability of *any* subdivision of section 300. (*In re Shelley J.*, *supra*, 68 Cal.App.4th at p. 330 ["Section 300 contemplates that jurisdiction may be based on any single subdivision"].)

detriment to child as a basis for its decision not to release her into father's custody. Any such finding made by the juvenile court was superfluous and unnecessary.⁷

The court properly declined to place child with father pursuant to section 361, subdivision (c)(1). Instead, she was returned to mother's care under the supervision of DCFS and therefore the court did not need to consider placement with "a nonoffending parent or guardian." Further, the court had no evidence to modify its prior finding that father's contact with child should be monitored until father completed drug rehabilitation and testing. Father failed to contact DCFS, failed to contact his lawyer, and failed to appear in court. He made no effort whatsoever to present "a plan acceptable to the court demonstrating that he . . . will be able to protect the child from future harm." (§ 361, subd. (c)(1).)

Father's arguments regarding section 361, subdivision (c) are without merit.

III. Amendment of Petition to Conform to Proof

Following the adjudication hearing, the juvenile court amended the allegations to conform to proof, adding a sentence that read: "father previously received reunification services and failed to reunify; the case closed with father having monitored visits because he did not make substantial progress in a drug abuse treatment program and testing nor did he verify stable housing and a stable lifestyle." Father contends that the juvenile court erred in amending the section 300 petition to conform to proof because such amendment, absent notice to father, denied father his right to due process.

As set forth in *In re Jessica C.* (2001) 93 Cal.App.4th 1027, because dependency petitions are often drafted with haste, "the ability to amend according to proof plays an important role in the overall dependency scheme." (*Id.* at p. 1041.) "[A]mendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice. [Citation.]" (*Id.* at p. 1042.) Such an amendment should only be disallowed where the

⁷ In fact, father is not seeking physical custody of child at this time.

“variance between pleading and proof . . . is so wide that it would . . . violate due process to allow the amendment.” (*Id.* at pp. 1041-1042.)

Such a variance does not exist in the present case. In the initial detention report, DCFS informed the court of child’s prior child welfare history, including information regarding prior sustained allegations against father. DCFS maintained that father should not be granted reunification services because of the prior sustained petition. In addition, the juvenile court specifically requested that father’s counsel submit points and authorities as to why a parent whose family reunification services were previously terminated should be granted family reunification services on a subsequent petition. Thus, the juvenile court made it known to father’s counsel that the termination of father’s prior reunification services was a significant issue. Father was given the opportunity to present evidence that he had made progress in fulfilling the requirements of his prior reunification services, and did not do so. He was not misled or prejudiced by the amendment, therefore no error occurred.

DISPOSITION

The orders are affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD